

Decision 05-09-012 September 8, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Eureka Broadband Corporation and A.R.C. Networks, Inc. to Complete a Transfer of Control of A.R.C. Networks, Inc. (A.00-05-042) an Authorized Carrier, and Related Transactions.

Application 05-06-027
(Filed June 9, 2005)

OPINION GRANTING TRANSFER OF CONTROL

I. Summary

This decision authorizes the transfer of control of A.R.C. Networks, Inc., U-5686-C, (A.R.C.) to Eureka Broadband Corporation, dba Eureka Networks (Eureka). This transfer of control is to take place through a stock conversion of each share of the preferred stock of InfoHighway Communications Corporation (InfoHighway), A.R.C.'s parent, after which Eureka will indirectly own all of the outstanding stock of InfoHighway.

II. The Parties

InfoHighway is the parent of A.R.C. In Decision (D.) 00-09-060, we granted A.R.C. dba InfoHighway a certificate of public convenience and necessity (CPCN) to provide competitive local exchange telecommunications services utilizing resale of other carriers' service or unbundled network elements. InfoHighway provides integrated telecommunications solutions primarily to business customers in major markets. A.R.C. offers local and long distance telephone services, point-to-point data services, high-speed Internet services, network design and wiring.

Eureka, a Delaware corporation, provides facilities-based Internet services, high-speed Internet access, and IP-based application services to business customers with bandwidth-intensive needs, and local and long distance voice products. Eureka's primary operations are in the New York City and Washington D.C. metropolitan areas.

Eureka's management team is run by Jeffrey Ginsberg, the Chairman of the Board of Eureka, and Raul K. Martynek, the President and Chief Executive Officer of Eureka. Ginsberg is an experienced telecommunications entrepreneur who manages the overall strategic direction of the business. Martynek formerly was the Chief Operating Officer of Eureka Networks, where he oversaw all corporate operations and was responsible for all facets of the company's voice and data operations. Under Martynek's leadership, Eureka has recently demonstrated strong financial performance.

III. The Transaction

The proposed transfer of control is to take place pursuant to a May 9, 2005 Agreement and Plan of Merger, a copy of which was provided under seal. Pursuant to that agreement, InfoHighway will become an indirect, wholly owned subsidiary of Eureka. Each share of preferred stock of InfoHighway will be converted into the right to receive a portion of the merger proceeds. Following the proposed transaction, Eureka will indirectly own all of the outstanding stock of InfoHighway. The proposed transaction is not scheduled to close until all of the conditions set forth in the Agreement and Plan of Merger have been satisfied, including our approval.

Eureka seeks to acquire control of InfoHighway to expand its operations outside of New York City and the mid-Atlantic region and to offer an expanded line of products and services, in particular, regulated services to commercial and

residential customers. In this regard, the proposed transactions will be transparent to A.R.C.'s California customers.

Eureka intends to operate A.R.C. as it exists and operates today. A.R.C. will continue to provide services under the same rates, terms, and conditions as those services are currently provided in California.

IV. Discussion

Applicants seek approval of the proposed transfer of control pursuant to Pub. Util. Code § 854(a), which requires prior Commission authorization of mergers, acquisitions, or transfers of control.

A. The Public Interest

We have broad discretion to determine if it is in the public interest to authorize a transaction pursuant to § 854(a).¹ The primary standard used by the Commission to determine if a transaction should be authorized under § 854(a) is whether the transaction will adversely affect the public interest.² The Commission may also consider if the transaction will serve the public interest.³

¹ D.95-10-045, 1995 Cal. PUC LEXIS 901, *18-19; and D.91-05-026, 40 CPUC 2d 159, 171.

² D.00-06-079, p. 13; D.00-06-057, p. 7; D.00-05-047, p. 11 and Conclusion of Law (COL) 2; D.00-05-023, p. 18; D.99-03-019, p. 14; D.98-08-068, p. 22; D.98-05-022, p. 17; D.97-07-060, 73 CPUC 2d 601, 609; D.70829, 65 CPUC 637, 637; and D.65634, 61 CPUC 160, 161.

³ D.00-06-005, 2000 Cal. PUC LEXIS 281, *4; D.99-04-066, p. 5; D.99-02-036, p. 9; D.97-06-066, 72 CPUC 2d 851, 861; D.95-10-045, 62 CPUC 2d 160, 167; D.94-01-041, 53 CPUC 2d 116, 119; D.93-04-019, 48 CPUC 2d 601, 603; D.86-03-090, 1986 Cal. PUC LEXIS 198 *28 and COL 3; and D.8491, 19 CRC 199, 200.

Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.⁴

Applicants state Eureka's acquisition of A.R.C. serves the public interest in promoting competition among telecommunications providers in California. The proposed transaction will combine the strengths of Applicants, which should allow the combined companies to compete more effectively against incumbent carriers and larger competitive carriers. The combined companies will be able to expand their respective operations in terms of service area coverage and products and services.

B. CEQA

Under the California Environmental Quality Act (CEQA) and Rule 17.1 of the Commission's Rules of Practice and Procedure (Rules), we must consider the environmental consequences of projects that are subject to our discretionary review. (Pub. Resources Code § 21080.) It is possible that a change of ownership and/or control may alter an approved project, result in new projects, or change facility operations, etc. in ways that have an environmental impact.

Applicants did not address environmental consequences of the proposed transaction in the application. At the request of the administrative law judge (ALJ), Applicants furnished additional information on August 16, 2005. Applicants note that A.R.C. is operating as a reseller and that its operations do not and will not, after the proposed transaction is completed, entail the

⁴ D.95-10-045, 62 CPUC 2d 160, 167-68; D.94-01-041, 53 CPUC 2d 116, 119; D.90-07-030, 1990 Cal. PUC LEXIS 612 *5; D.89-07-016, 32 CPUC 2d 233, 242; D.86-03-090, 1986 Cal. PUC LEXIS 198 *84-85 and COL 16; and D.3320, 10 CRC 56, 63.

installation or erection of any structures. Applicants assert the proposed transaction will have no impact on the environment.

Based on the record, the transfer of control at issue in this proceeding will have no significant effect on the environment. Therefore, the proposed project qualifies for an exemption from CEQA pursuant to § 15061(b)(3)(1) of the CEQA guidelines.

C. The Proposed Transaction Should Be Approved

For the following reasons, we conclude that it is reasonable to grant this § 854(a) application. First, A.R.C. will continue to operate as it has in the past using the same name and operating authority and all rights and obligations of A.R.C. shall remain after the proposed transaction is completed. Second, the public may benefit from the transfer of control to the extent the transaction enhances A.R.C.'s ability to maintain and expand its services and operations in California, including Internet protocol products and services. Third, Eureka possesses the technical, managerial, and financial qualifications necessary to exercise control of A.R.C. Fourth, there is no opposition to this application. Fifth, the proposed transaction will have no environmental impact. Thus it is clear that approval of the proposed transaction will not adversely affect the public interest.

V. Category and Need for Hearing

In Resolution ALJ 176-3155, dated June 30, 2005, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. Based on the record, we affirm that this is a ratesetting proceeding, and that hearings are not necessary.

VI. Ex Parte Relief

Applicants have requested ex parte relief without a hearing pursuant to Rule 15(d). This relief is requested on the basis that approval of the transfer of control will not result in any changes in the manner in which A.R.C. provides service to California telephone subscribers. Ex parte relief should be granted on the basis that there is no indication that the transfer of control would be inconsistent with or adverse to the public interest.

VII. Motion for Confidential Treatment of Proprietary Information

Applicants request confidential treatment of the transaction documents and financial information submitted under seal with the application as Exhibits A and D, respectively. The transaction documents contain highly sensitive and proprietary information, which, if public, would place Applicants at a competitive disadvantage relative to other companies in the telecommunications industry. We have granted similar requests for confidential treatment. We will issue an appropriate protective order.

VIII. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Therefore, the otherwise applicable 30-day period for public review and comment is being waived pursuant to Pub. Util. Code § 311(g)(2).

IX. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janice Grau is the assigned ALJ in this proceeding.

Findings of Fact

1. A.R.C. dba InfoHighway possesses a CPCN to provide competitive local exchange telecommunications services utilizing resale or unbundled network elements under the U-5686-C corporate identification number.

2. Applicants seek authority for Eureka to acquire control of InfoHighway through the conversion of each share of preferred stock of InfoHighway into the right to receive a portion of the merger proceeds. After the payment of the merger proceeds, Eureka will indirectly own all the outstanding stock of InfoHighway.

3. Pub. Util. Code § 854(a) requires prior Commission authorization to transfer control of a public utility.

4. A.R.C. will continue offering its current services under the same rates, terms, and conditions and continue using the same name and authority after the transfer of control.

5. Eureka has the technical, managerial, and financial qualifications necessary to exercise control of A.R.C.

6. A.R.C. will not install or erect any structures after the transfer of control.

7. There is no opposition to this application.

8. Due to the confidential and proprietary nature of certain materials contained in the confidential Exhibits A and D, it is reasonable that they remain under seal for two years unless a request made prior to the expiration of that time demonstrates a need for further protection.

Conclusions of Law

1. The proposed transaction will not adversely affect the public interest.

2. The proposed transfer qualifies for an exemption from the CEQA under CEQA guidelines § 1506(b)(3)(1).

3. To the extent the application seeks authorization for a change of control pursuant to Pub. Util. Code § 854, the application should be approved.

4. The application should be granted on an ex parte basis.

5. This order should become effective immediately because the public may benefit from Eureka's ability to maintain and expand A.R.C.'s services and operations in California.

O R D E R

IT IS ORDERED that:

1. The application for authority to transfer control of A.R.C. Networks, Inc. (A.R.C.) to Eureka Broadband Corporation (Eureka) pursuant to Pub. Util. Code § 854 is granted as set forth below.
2. A.R.C. shall continue to be responsible for prior and future claims, collected fees, uncollected fees, and surcharges applicable to fund the Universal Lifeline Telephone Service, California Relay Service and Communications Devices Fund, Commission User Fees, California High Cost Funds, and the California Teleconnect Fund, including any fees and surcharges which A.R.C. may not have yet collected.
3. Within 30 days after the change of control authorized herein has taken place, A.R.C. shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of control.
4. The corporate identification number U-5686-C assigned to A.R.C. shall continue to be used by A.R.C., which shall be included in all original filings with this Commission and in the titles of other pleadings filed in existing cases.
5. Eureka and its affiliated companies which transact business with A.R.C. shall, upon Commission staff request, make all books and records available for review and inspection.
6. Eureka and A.R.C.'s motion for confidential treatment of proprietary information contained in Exhibits A and D is granted. Exhibits A and D shall remain under seal and shall not be accessible or disclosed to persons other than Commission staff absent an order of the Commission, the assigned Commissioner or administrative law judge (ALJ) or the law and motion ALJ, for

a period of two years. If protection beyond that date is required, A.R.C. shall file a motion prior to the expiration of that period, explaining why further protection is needed.

7. The authority granted shall expire if not exercised within one year of the effective date of this order.

8. Application 05-06-027 is closed.

This order is effective today.

Dated September 8, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners